No. 416

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

FLORENCE FLAST, ET AL., APPELLANTS

v.

JOHN W. GARDNER, as Secretary of Health, Education, and Welfare, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE

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In the

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No. 416

Florence Flast, Albert Shanker, Helen D. Henkin, Frank Abrams, C. Irving Dwork, Florine Levin and Helen L. Buttenwieser,

Appellants,

against

John W. Gardner, as Secretary of the Department of Health, Education and Welfare of the United States, and Harold Howe, 2d, as Commissioner of Education of the United States,

Appellees.

BRIEF OF PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

Protestants and Other Americans United for Separation of Church and State is a nonprofit, educational corporation organized under the laws of the District of Columbia and is a national organization of over 100,000 members interested in the preservation of civil rights arising from the constitutional principle of separation of church and state and the preservation of religious liberty as guaranteed under the religious clauses of the state and federal constitutions. "Americans United" and many of its members have suits pending in various courts seeking redress for alleged infringements

against their constitutional right as citizens and taxpayers to be free of "establishment." It is quite possible that these suits will be dismissed if this court rules that there is no "standing" in federal courts to entertain their complaints.

STATUTE INVOLVED

The statutory provisions involved in this suit are Title I and II of the Elementary and Secondary Education Act of 1965.

THE QUESTION PRESENTED

Does a plaintiff suing as a federal "citizen and taxpayer" assert "a legally cognizable injury" sustained by him when he alleges that a federal statute authorizes, or is being applied to grant, support for one or more religious establishments in contravention of the establishment and free exercise clauses of the First Amendment of the United States Constitution?

STATEMENT OF THE CASE

Certain individuals, citizens and taxpayers of the United States, and residents of the State of New York filed a complaint challenging the constitutionality, under the religious clauses of the First Amendment, of certain actions and expenditures proposed by officials of the Department of Health, Education & Welfare of the United States, acting under color of Titles I and II of the Elementary and Secondary Education Act of 1965 (20 U.S.C. §§ 241a-1, 821-27).

The complaint alleged that the actions were designed to finance the furnishing of instructional material for use in religious and church schools. The plaintiffs request a judgment declaring these expenditures to be unconstitutional and seek an injunction against further expenditures for these purposes. The plaintiffs alleged personal and grievous hurt of the type which the "establishment clause" was meant to

prevent. The plaintiffs object, on constitutional grounds, to being forced to be unwilling contributors to the support of church schools. They rely upon the "establishment" and "free exercise" clauses of the First Amendment to the United States Constitution, as interpreted by this court, to protect them from their government's participation in the establishment of any religion or church.

The District Court dismissed the complaint on the ground that following the reasoning set forth in *Frothingham v. Mellon*, 262 U.S. 447 (1923), the plaintiffs had no standing to bring the actions; that there is no justiciable controversy and that the court, therefore, lacked jurisdiction.

SUMMARY OF ARGUMENT

The court below relies on the holding in *Frothingham v. Mellon*, 262 U.S. 447 (1923), to dismiss the appellants' complaint that their constitutional right to be free of establishment under the "establishment clause" of the First Amendment would be violated by the defendant's use of government facilities to finance guidance services and instruction in reading, arithmetic and other subjects in church schools. The appellee contends that *Frothingham* is determinative of standing in the present case. Amicus argues that if it is, then it is precedent for a finding of "standing" rather than for its denial. Even under *Frothingham*, the appellants have a right to present the threatened invasion of their personal religious freedom—their right to be free of "establishment" to a federal court for redress. In *Frothingham*, an irate taxpayer acting as a volunteer "supervisor" asked a federal court to determine the constitutionality of an appropriation act providing funds for a welfare program having to do with "maternity." No personal injury or deprivation of any sort, no invasion of any constitutional right, privilege or immunity was claimed. Here the appellants complained of an infraction of their personal right to be free of "religious establishment." They did not come to the court as mere taxpayers seeking to exercise a supervisory role over the government's use of tax funds.

The appellants rely on such decisions of this court as *Hammer v. Dagenhart*, 247 U.S. 251; *United States v. Butler*, 297 U.S. 1, and *Engel v. Vitale*, 370 U.S. 421.

The appellants contend that the "establishment clause" of the First Amendment to the United States Constitution forbids the use of tax money or government resources to support any religion, and confers a right upon citizens of the United States to claim protection in the courts from a violation thereof. The violation involved in the present case is the use of federal funds under Title I and II of the Elementary and Secondary Education Act of 1965, 20 U.S.C., Sections 241a-1, 821-827 (1965) [hereinafter referred to as the "Education Act"] to provide instruction in reading, mathematics and other subjects, and guidance services and to provide textbooks, library materials and other materials in church schools.

The constitutional clause invaded is found in the Bill of Rights – the First Amendment to the United States Constitution:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; . . ." (U.S. Constitution, Amendment 1).

The first clause of that amendment is known as the "establishment clause" and bans the use of public moneys to support any religion or all religions. The appellants rely on *Engel v. Vitale*, 370 U.S. 421 to show that the indirect coercive pressure of the defendant's action is an unconstitutional invasion of the plaintiffs' First Amendment right to be free of "establishment." This court in *Everson v. Board of Education*, 330 U.S. 1, clearly stated the parameters of the "establishment clause" and there should be no difficulty in finding that the activity complained of comes within the strictures of the "establishment clause" as so defined.

ARGUMENT

The Opinion in *Frothingham v. Mellon*, 262 U.S. 447, That a Taxpayer Lacks Standing To Question the Constitutionality of the Use of Tax Funds by the Federal Government Is Not Applicable to a Complaint Arising From an Alleged Deprivation of a Religious or Other Civil Right.

The majority opinion of the court below rests on *Frothingham v. Mellon*, 262 U.S. 447, (1923) as authority to dismiss this action for lack of "standing." On the other hand, we contend that *Frothingham* is distinguishable and actually is precedent for a finding of "standing" in this case.

Mrs. Frothingham of *Frothingham* came into the District Court as a taxpayer of the United States and:

> ". . . her contention, though not clear, seems to be that the effect of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law," (p. 486)

The court held:

> "We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. *That question may be considered when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.*" (p. 488) (emphasis supplied)

Mrs. Frothingham as an irate taxpayer acting as a "supervisor" asked the federal court to determine the unconstitutionality of an appropriation act providing funds for a welfare program having to do with "maternity." No personal injury or deprivation of any sort, no invasion of any constitutional right, privilege, or immunity was claimed by or on behalf of Mrs. Frothingham.

Further, a reading of the briefs filed in *Frothingham v. Mellon* reveals that the litigants did not consider the possibility of loss of access to the courts because of "standing"

to be a major problem in the case. There was no thorough presentation by counsel of the legal background upon which to base a finding of a lack of "standing." This court indicated that the matter was one of first impression.

Justice Douglas has subsequently indicated that he has experienced great difficulty with *Frothingham*. In *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111 (1962), Justice Douglas, concurring, stated:

> "That case held that a taxpayer of the United States had no standing to challenge a federal appropriation, since the question was essentially a matter of public not private concern. . . this ruling was projected into the state field by the *Doremus* case, barring relief to those legitimately concerned with the operation of the public school system." (114-115)

Justice Douglas favorably quotes Edmond Cohn's "How To Destroy the Churches" (Harper's Magazine, November, 1961, p. 36):

> "Rulings of this kind, designed to keep peace among the departments of the government, are eminently sensible as over-all policies. Yet they also provide a way to immunize a bad law from attack in the courts: one need only frame the law in such a way as to violate the basic rights of nobody in particular but everybody in general, that is, of the *entire* American people. Then, since no one can point to an injury that is distinguished from his neighbors', no one can come into court and challenge the legislation' " (369 U.S. at 116 (N).)

However, the court need not reevaluate *Frothingham*, but merely distinguish it from the case at bar and confine it to the type of litigation brought by Mrs. Frothingham – a taxpayer's complaint of a supervisory nature.

We only ask this court to distinguish the present factual situation from that in a taxpayer's suit which is supervisory in nature as in *Frothingham* where the taxpayer objected to an action which harmed all taxpayers because it represented a misuse of tax funds. The doctrine enumerated in

Frothingham should be limited to cases where the taxpayer does not rest his claim for standing on the infringement of a personal constitutional right as in this case where a religious civil right guaranteed by the First Amendment to the United States Constitution is alleged to be invaded.

This court has long made such a distinction without pointing it out in so many words. For example, in *Hammer v. Dagenhart*, 247 U.S. 251, 38 S.Ct. 529 (1918), the father of two minor sons was able in the United States District Court for the Western Division of North Carolina to test the constitutionality of a federal statute designed to prevent interstate commerce in the products of child labor. The District Court held the law unconstitutional. On appeal to this court, Mr. Justice Day allowed plaintiffs access to the court. Perhaps this was because, as in the case at bar, there was involved a question of a possible infringement of a "right" of the plaintiff. While granting that the decision on the merits would not represent the law today, nevertheless, the case is precedent for this court to permit "standing" in a case where a civil right is claimed to be invaded. In *Hammer v. Dagenhart*, the plaintiff's children's privilege to work was jeopardized by an act of Congress. The enforcement of the act would have deprived children of a certain age of their alleged right to work – a right which they shared with all other children similarly situated. The court heard their cause.

In another important case *United States v. Butler*, 297 U.S. 1 (1935), the defendants relied upon *Frothingham*, but this court had no difficulty distinguishing the case:

> "*Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.ed. 1078, is claimed to foreclose litigation by the respondents or other taxpayers, as such, looking to restraint of the expenditure of government funds. That case might be an authority in the petitioners' favor if we were here concerned merely with a suit by a taxpayer to restrain the expenditure of the public moneys. It was held that a taxpayer of the United States may not question ex-

penditures from its treasury on the ground that the alleged unlawful diversion will deplete the public funds and this increase the burden of future taxation." (p. 57-58)

In the present case, appellants seek redress for a personal grievance, the use of public funds, resources and personnel in a way which clearly aids the establishment of religion, with a threat of spiritual and physical injury to themselves, if the "establishment" takes place. Any action on the part of persons in the employ of the federal or state governments to use the government resources at their command to establish any religion poses a threat to the appellants' present peace of mind and eventual safety contrary to the guarantee of the Bill of Rights.

There are other cases which can be cited as precedent for limiting *Frothingham* to situations where the plaintiff as a taxpayer exercises a "supervisory" role rather than is a victim of some invasion of his civil rights. In *Engel v. Vitale*, 370 U.S. 421 (1962), the parents of ten public school pupils brought an action in a New York State court insisting that the required use of an officially composed prayer in the public schools violated both the "establishment" and "free exercise" clauses of the First Amendment. This Court did not struggle with the question of standing, but proceeded to find the statute in question unconstitutional on "establishment" grounds.

In *Vitale* and later *School District of Abington v. Schempp*, 374 U.S. 203 (1963) there is recognized a constitutional right not to have one's children exposed to religious indoctrination at the hands of the state. When the government furnishes funds to assist in the educational process of church schools, it assists in the work of churches to indoctrinate children in their particular faith. This court in *Schempp* not only found that the required reading of the Bible in a public school as part of a religious exercise is designed to establish religion and is therefore unconstitutional, but acknowledged that one has a right not to be indoctrinated by the state with any

religion in violation of one's constitutional right to "free exercise." Hence, it seems clear that any governmental aid to religious indoctrination in public or church schools gives a person who is personally offended thereby a right to bring an action in the federal courts to stop the practice before there develops an "establishment" of religion presenting a clear menance and threat to one's religious liberty. This, regardless of whether the person is a taxpayer or not.

Reliance is placed by many who would defeat the jurisdiction of the federal courts in religious rights cases on *Doremus v. Board of Education*, 342 U.S. 429 (1952). In that case, Mr. Justice Jackson pointed out that the Supreme Court of New Jersey had found:

> "*No one is before us asserting that his religious practices have been interfered with or that his right to worship in accordance with the dictates of his conscience has been suppressed.* No religious sect is a party to the cause. No representative of, or spokesman for, a religious body has attacked the statute here or below. One of the plaintiffs is 'a citizen and taxpayer'; the only interest he asserts is just that. . ." (p. 431) (emphasis supplied)

The majority opinion of the court below disregards the distinction of the factual situation between this case and *Doremus*.

> "Moreover, plaintiffs' attempt to distinguish *Frothingham* on the grounds that the instant litigation involves rights protected by the First Amendment must be rejected in light of the Supreme Court's decision in *Doremus v. Board of Education*, 342 U.S. 429 (1952)."

But *Doremus* did not involve persons asserting an invasion of their religious rights under the United States Constitution. *Doremus* was a taxpayer's action without any showing of financial injury. On the contrary, the plaintiffs here "'allege the vividly personal, vital, and grave hurt against which the Establishment Clause was meant to guard.'" We do not argue with *Doremus* that if a taxpayer bases his

complaint *solely* on the idea that the use of his taxes is illegal that he must show the invasion of a direct financial interest. But here, the appellants have pleaded "the requisite special injury. They have contended that the deprivation of their civil right to be free of "establishment" with its consequent physical and mental damage is a special injury. The claimed injuries here are "precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages." *McCollum v. Board of Education*, 333 U.S. 203 at 228 (1948) (Frankfurter J. concurring).

Chester Antieau, *Commentaries on the Constitution of the United States*, 219, 220 (1960) points out that a test of reasonableness which might be acceptable for legislation dealing with public welfare and economic policy such as was involved in *Frothingham*, is inapplicable to matters of religious liberty because such a test

> "is gross error for it puts freedom of religion and communication on the same level as the 'right' to run a sweatshop and utterly disregards the fact that the Founding Fathers deliberatey enshrined this particular right in the Constitution to permanently indicate its place in our hierarchy of socio-legal values."

Mr. Justice Stone likewise in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1958) contrasted the favored position of those seeking protection for religious liberty compared to a mere economic matter. He stated:

> "(R)egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis with the knowledge and experience of the legislators. (4)

(Note 4)

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth." See *Stromberg v. California*, 283 U.S. 359, 369-70; *Lovell v. Griffin*, 303 U.S. 444.

We contend that the opinion of the court below leaves the appellants without a judicial remedy for the abuse of one of the most important civil rights guaranteed by the First Amendment to the United States Constitution. It is the right to be free of religious establishment and to exercise one's own religion, or enjoy one's lack of religion, free of coerced financial support of any religion.

There can be no doubt that this court has repeatedly ruled that no state nor the federal government may use taxpayers' funds to aid religious institutions in their good works. The Supreme Court of the United States has made this clear, case by case, to cite but a few:

> "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person." *Zorach v. Clauson*, 343 U.S. 306 at 314.

> "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel v. Vitale*, 370 U.S. 421 at 431.

The Elementary and Secondary Education Act of 1965 has resulted in the channeling of federal funds into schools of the various churches. To be sure, this has been done by circuitous means and under the guise of "aiding the child," but the end effect has been that of public assistance to church institutions. The controversies over the administra-

tion of such aid that have broken out in virtually every state point up the serious difficulties which continuance of this unconstitutional program will bring.

The one sure way to establish religion is to finance it. The "Education Act" results in the financing of religion's most essential ministry, its program of indoctrination of the young. What results can we expect from such a program? In 1918, Holland amended its constitution and provided for the distribution of the state's funds to religious schools. Holland had at that time a great system of common schools in which most of the children were educated. In the half century since, that system has been decimated and its decline continues. Today only one-fourth of the children at the elementary level, and one-third at the secondary level are educated in the public schools of that country. The confessional schools, Protestant and Roman Catholic, have taken over.

The deep cultural fissures for which Holland is noted are attributed by sociologists and historians to the division of the children in the schools. In Holland, television and radio are divided on a sectarian basis – Protestant and Catholic. The political parties are organized by religion – Protestant and Catholic. Labor unions, manufacturers' associations and farmers' groups are similarly organized – by religion. Hiring practices are rigid – Catholic hires Catholic; Protestant hires Protestant. The sectarian divisions are dug deep into the face of Holland and it is the schools that have dug them in. The children divide by religion when they go to school and they continue the division the rest of their life, in everything they do. The framers of the "Bill of Rights" protected us to the best of their ability against such divisiveness.

Thus far, we have moved only part way into such a program of sectarian subsidy here in this country. But it has been enough to indicate a trend. The so-called "Christian Day Schools" have been greatly expanded in the past two years. Many sects have given indication that they are ready

to take advantage of proffered federal funds to set up private institutions. The desire to escape racial integration in the public schools provides another incentive. In this melange of schools, all supported by tax funds the concept of public schools, of, by, and for all the people, will be diluted imminently and dissolved ultimately.

The Education Act has had a shattering effect upon local controls and practices in education. With the legislation's announced purpose of circumventing or overriding state provisions in regard to the separation of church and state, the severest kind of damage is already evident. For under this legislation what state law forbids, the federal agency insists upon as the price of drawing the funds at all. At one time in our history certain states developed a doctrine of nullification by which they sought to be rid of federal requirements which they resented. Today we have nullification in reverse. We have the federal government nullifying state provisions and state controls with which it professes to disagree. In the process it is also destroying our entire tradition of the local control and management of education.

The constitutional principle of separation of church and state is a sure casualty of this kind of law. What separation is there when the federal government, under whatever pretext, is pouring its funds into church institutions? All the ills which a union or partial union of state and church have traditionally created are in the making here. The sects compete for the tax dollar. The government must face the anger of people who resent nothing more than being taxed for religion. Churches and clergy show a steadily declining status in the estimate of the people. The spiritual effectiveness of a church declines as its government subsidy rises.

The appellants have a right set forth in the Bill of Rights in the Federal Constitution not to be coerced into financing the destruction of the public school system, into financing religious divisiveness, and those appellants who are adherents of minority faiths into financing their own probable

eventual persecution. And with this right goes the privilege of its defense in the federal courts by any person whose religious beliefs would put him in jeopardy if state establishment of a religion other than his own were consequent to the unconstitutional actions.

Finally, let us add that the principle of separation of church and state embodied in the First Amendment and in the learned opinions of this court is still cherished by the plain people of this nation. On November 7, 1967, the citizens of New York voted by an almost three to one majority to reject a new state constitution which omitted the stipulation which is in the present New York Constitution that no tax funds can be spent, directly or indirectly, for schools under sectarian control, or in which any denominational tenet or doctrine is taught. Not one of the state's sixty-two counties, not one of New York City's five boroughs, voted to accept the new charter. This, in spite of the fact that the full resources and political power of the Roman Catholic Church were marshalled behind the proposed new Constitution. Millions of dollars were spent in advertising and backing the new charter. A manifesto urging a "YES" vote on the new charter was read in every Catholic Church in the Archdiocese of New York. This, in spite of the fact that the powerful AFL-CIO leadership backed the proposed new constitution. This, in spite of the fact that a constitutional convention had spent six months and millions of dollars formulating the new charter.

It foundered on one rock: It was rejected by persons of all faiths because of its failure to protect the citizens of New York against the use of tax money for church schools. It took the votes of thousands of Catholic believers to keep the prohibition against the use of government funds generated by the taxpayers of New York for aid to churches from being eliminated. To preserve this principle so highly held by the framers of our constitution that it was made a personal right under the First Amendment, and is found similarly in the constitutions of the vast majority of the states,

this court should reaffirm the right of citizens to seek redress in the federal courts for violations of their right to be free of establishment and to enjoy religious freedom.

CONCLUSION

For the reason stated, it is respectfully submitted that the order of the United States District Court for the Southern District of New York should be reversed and the case returned to the lower court for reconsideration on the merits.

Respectfully submitted,

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